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CHARLES ELMORE CROFT

IN THE  
**Supreme Court of The United States**

October Term, ~~1949~~ **1950**

**1951**

NO. ~~304~~ **4**

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**GEORGIA RAILROAD & BANKING CO.,**  
*Appellant*

**VS.**

**CHARLES D. REDWINE, State Revenue Commissioner,**  
*Appellee*

**REPLY BRIEF FOR APPELLANT**

**ROBERT B. TROUTMAN**  
**FURMAN SMITH**  
*Attorneys for Appellant*

**Spalding, Sibley, Troutman & Kelley**  
**434 Trust Company of Georgia Bldg.**  
**Atlanta, Georgia**  
*of Counsel for Appellant.*

## INDEX

	<i>Page</i>
Appellee Is Inconsistent . . . . .	1
Allen Case, Not Ayers Case Controlling . . . . .	1
Wright Case Not Action for Declaratory Judgment . . . . .	2
Appellee Bound by Prior Decree . . . . .	3
14th Amendment Gives Appellant Right to Enjoin . . . . .	5
No Plain Remedy in Courts of Georgia . . . . .	5
Appeal to Superior Court . . . . .	6
Payment and Suit to Recover . . . . .	6
Affidavit of Illegality . . . . .	7
Suit for Injunction in State Court . . . . .	8
Contract Valid . . . . .	9
Failure to Build All Lines Authorized . . . . .	9

## LIST OF AUTHORITIES CITED

Bacon v. Texas, 163 U. S. 207 . . . . .	10
Ford Motor Co. v. Department of Treasury, 323 U. S. 459 . . . . .	5
Gunter v. Atlantic Coast Line, 200 U. S. 273 . . . . .	3
Morgan v. Louisiana, 93 U. S. 217 . . . . .	10
Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139 . . . . .	5, 9
State v. Morgan, 28 La. 490 . . . . .	9

### STATUTES CITED:

Georgia Code of 1933, Sec. 92-7301 . . . . .	8
--	---

### GEORGIA STATUTES CITED:

Act of August 28, 1931 . . . . .	8
Act of January 3, 1938 . . . . .	8
Act of 1938 as Amended by Act of 1943 . . . . .	6

IN THE  
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NO. 434

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GEORGIA RAILROAD & BANKING CO.,

*Appellant*

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

*Appellee*

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**REPLY BRIEF FOR APPELLANT**

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*Appellee Is Inconsistent.*

Appellee argues that this action cannot be maintained because it is against the State of Georgia. At the same time he argues that the State is not bound by the decree in the *Wright* case because the prior action was against Wright as an individual wrongdoer and not against the State. Yet the two actions are in substantially the same form. Both of these contradictory positions are necessary to sustain the judgment below. Appellee does not attempt to reconcile them.

*Allen Case, Not Ayers Case Controlling.*

Appellee says (his brief, p. 11) : "... the distinction between the *Allen* case and the *Ayers* case rests on the familiar principle that when authority to act is exceeded, action by the officer beyond his authority is personal action only.

"... On the other hand, the authority of the Attorney General to maintain a suit in behalf of the State is not limited to

those suits where the State is entitled to prevail."

As Appellee says, the reason that the acts of the Attorney General in the *Ayers* case were held to be within his authority and not to be enjoined was that his authority to bring suit on behalf of the State was not limited to those acts in which the State would necessarily prevail.

But this Court has held, in the *Wright* case and other cases, that the Revenue Commissioner cannot be constitutionally authorized to seize the property of Appellant for these taxes. Therefore, his threatened acts are beyond his authority and, under Appellee's own argument, may be enjoined.

It may be that if the Commissioner, instead of attempting to seize Appellant's property, had brought suit to collect these taxes, Appellant could not have enjoined such suit (but see the *Gunter* case, 200 U. S. 273). In any event, Appellant would not have attempted to enjoin such suit, for it could have set up all its rights in such action, and that is all it is seeking. Appellee, on the other hand, is trying to force Appellant to pay these taxes without any opportunity for hearing.

Therefore, under Appellee's own argument, this case falls under the *Allen* case and not the *Ayers* case.

*Wright Case Not Action  
for Declaratory Judgment.*

Appellee says (his brief, p. 18) the *Wright* case was action for declaratory judgment. An examination of the record will show that such was not the case. The complaint prayed for injunction. The decree granted a permanent injunction. The fact that the decree stated the conclusions on which the injunction was based did not convert the case into an action for declaratory judgment. If it had, this Court would have reversed, rather than affirmed, for this Court certainly knew that declaratory judgment was not then proper. Moreover, even if the decree had been erroneous in this regard, it certainly would not have been totally void.

*Appellee Bound by  
Prior Decree.*

Appellee indicates that we contend that the Governor or the Attorney General had authority to consent to a suit against the State, as for example, a suit for a money judgment to be paid out of the State Treasury. Such is not our contention.

It is our contention that when a state officer is sued as a wrongdoer the State may, if it elects, leave the officer to fend for himself. In such case judgment against the officer will be against him individually and will not bind the State.

But the State may, if it sees fit, ratify the acts of the officer and assume the defense of the action in order to protect the claims of the State and to secure an adjudication of such claims. If so, the State is bound by the decree as fully and to the same extent as if it were a party, under the familiar principle that a person not a party to the record who, to protect some interest of his own, openly assumes the defense of a suit is bound by the decree as fully and to the same extent as if he has been a party to the record.

Such was the holding of this Court in the *Gunter* case (200 U. S. 273).

In the *Gunter* case this Court did not hold that the prior *Pegues* case was against the State of South Carolina. On the contrary the Court made it clear that such suit was not originally against the State:

"In view of the prohibitions of the 11th Amendment to the Constitution of the United States, The State, without its consent, may not be sued by an individual in a Circuit Court of the United States.

"A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibitions of the 11th Amendment." (p. 283.)

What this Court held in the *Gunter* case was that when the

State of South Carolina authorized its officials to defend the *Pegues* case on behalf of the State, the State of South Carolina became bound as fully as if it had originally been a party.

And what we contend in this case is that the Comptroller General, the Governor and the Attorney General were fully authorized, and in fact required, by the law of Georgia to defend the *Wright* case on behalf of the State. We submit that the Georgia statutes quoted in our original brief are in all material respects the same as the South Carolina statutes involved in the *Gunter* case.

Certainly the Governor and the Attorney General would have been authorized under the Georgia law to have brought action against Appellant to recover the tax. If they had, certainly the State of Georgia would have been bound by judgment in such action. There is no reason in law or in public policy why they were not equally authorized to intervene and assume the defense of, and seek an adjudication in, an action against the Comptroller in the Circuit Court of the United States. They recognized the obvious fact that the issue would ultimately be decided by this Court and that the most expeditious method of getting the case before this Court was in the action in the Circuit Court with a direct appeal to this Court.

Appellee does not argue, or at least does not cite any authority, that a State or its officials may ignore a final decree and permanent injunction of a federal court, affirmed by this Court, on the grounds that the State might have, but did not, plead immunity to suit in the action in which the decree is rendered. Such argument could not be made in view of the cases cited in our original brief (p. 11) holding that a final judgment of the Federal Court is valid and binding, although the District Court was without jurisdiction, and although the action might have been dismissed on motion of the defendant, or by the Court on its own motion, before the decree became final. Such final decree, as this Court has held, conclusively adjudicates that the Court had jurisdiction to render the decree just as it concludes every other question necessary to the decree.

*Ford Motor Co. v. Department of Treasury*, 323 U. S. 459, was a suit originally against the State asking a money judgment to be paid from the State Treasury and the question of immunity of the State from suit was raised in this Court before the decree became final.

#### *14th Amendment Gives Appellant Right to Enjoin.*

Appellee concedes (his brief pp. 33, 39) that the 14th Amendment requires that Appellant have opportunity to contest the taxability of its property in some forum, and that if no other forum is provided, a Court of Equity should enjoin the collection of the tax on that ground alone.

Appellant has already been denied such hearing in the Court of Georgia, *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139.\* If the judgment of the District Court dismissing this action is sustained, Appellant will be denied all opportunity for a hearing on the taxability of its property contrary to the 14th Amendment. Therefore, according to Appellee's own argument, the 14th Amendment requires that the judgment below be reversed and that the assessment be enjoined on this ground alone.

#### *No Plain Remedy in Courts of Georgia.*

The elaborate and ingenious argument of Appellee (his brief, pp. 33-40) on the remedies Appellant might have in the Courts of Georgia itself demonstrates that such remedies are not "plain" within the meaning of the *Johnson Act*.

As shown by the cases cited on page 32 of our original brief, this Court has held that the *Johnson Act* does not withdraw jurisdiction of the federal court unless the remedy in the state court is so plain and clear as not to admit of any reasonable doubt. This Court has held that where the state statutes are

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\* In that case Appellant sought and prayed for an injunction. Appellee in his brief (p. 4) so concedes.

ambiguous or where such statutes are new and have not yet been construed by the highest court of the state, the remedy will not be said to be so plain as to deny the federal court of jurisdiction (our original brief, p. 32).

### *Appeal to Superior Court.*

Appellee argues (his brief p. 33) that Appellant still has the right to appeal to the Superior Court from the assessment of the Commissioner as to taxability, although not as to valuation. Sec. 19 of the Act of 1938, as amended by the Act of 1943 (our original brief App. p. xxxiii) provides:

"The provisions of the foregoing section with reference to reviewing *assessments* of the State Revenue Commissioner shall not apply to *assessments* for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General."

The above provision says that the right of appeal shall not apply to any assessment for ad valorem taxation against railroads. It makes no exception as to taxability and draws no distinction between taxability and valuation. Clearly the right of appeal is not available.

### *Payment and Suit to Recover.*

Appellee admits (his brief p. 36) that there is no method of recovering the part of the tax which would be paid to the counties and cities. Probably well over 85% of the tax claimed in this case would be paid to county and city tax collectors rather than the State.

He says, however, that if Appellant paid the tax claimed by the State and brought suit to recover that part of the tax Appellant could confidently rely on the counties and cities waiting until such test case was decided by this Court before making any effort to collect any other tax.

The fact that the counties might, as a matter of grace, refrain from enforcing the tax against Appellant is not a remedy within the meaning of the *Johnson Act*.

Moreover, there is nothing in the history of this litigation to give any grounds for such confidence. The State and the several counties have tried in every way possible to force payment of this tax and to deny Appellant any opportunity to have its rights determined on their merits.

Appellee strenuously resisted our efforts to secure an injunction pending this appeal. There could have been no reason for resisting such injunction except the intention of the State and counties to proceed with the assessment and collection of the tax pending appeal if Appellee had been successful in persuading the District Court to deny such injunction. The District Court did deny injunction as to three miles between Camak and Warrenton, as to which the exemption may apply but which was not described in the original complaint. We requested Appellee to withhold assessment as to this part until this appeal could be determined. He summarily rejected our request, assessed the tax, and levied on property essential for railroad operations. Appellant, having no other recourse, has been forced to pay the tax on that part in order to prevent interruption of its railroad operation.

#### *Affidavit of Illegality.*

Appellee says (his brief p. 38) that we do not appear to take the position that the remedy of affidavit of illegality was repealed with respect to taxes assessed on behalf of counties and municipalities. We certainly intended to take such position. Such taxes are assessed and the execution issued by the Revenue Commissioner in the same manner as the taxes due the State. The "assessment" of county tax is by the Commissioner and not by the county. The state statute providing that the courts shall not have jurisdiction to question his assessment certainly applies to his assessment for county taxes as well as any other assessment.

Appellee himself recognizes that the assessment for county tax purposes is the same as any other assessment of the Commissioner, for he argues that the provisions for appeal from assessments of the Commissioner apply to such assessment for county taxes.

Appellee suggests (his brief, p. 37) that the Act approved August 28, 1931 (Georgia Laws 1931, p. 7, 33), codified in Sec. 92-7301 of the Georgia Code, gives the right of affidavit of illegality.

Sec. 82 of that Act provides, however;

"Sec. 82. All powers and functions heretofore imposed by law on the Comptroller General . . . are hereby imposed and retained." (Ga. Laws 1931, p. 34.)

Therefore, the enforcement of ad valorem taxes against railroads was retained in the Comptroller and was not transferred to the Revenue Commission created by that Act, and the provision as to affidavit of illegality set out in that Act had no application to ad valorem taxes against railroads. The Comptroller General so ruled, as is set out in the editorial note under that section in the Annotated Code.

Moreover, that section, along with the other similar sections, were necessarily repealed by the Act of 1938 (our original brief, App. xxviii).

Our argument (original brief, p. 36) that to test the question by affidavit of illegality might require 310 executions and 310 affidavits of illegality returnable to 14 different courts was an additional reason why such remedy is not adequate or efficient, and was not intended as the only reason, as Appellee says (his brief p. 38).

### *Suit for Injunction in State Court.*

Appellee argues (his brief p. 39) that Appellant could sue in equity in the Superior Court of Fulton County. The cases he cites, however, all arose before the passage of the Act approved January 3, 1933, Sec. 44 of which provides that no trial court

shall have jurisdiction to question the assessment of the Commissioner except as in the Act provided (Appendix to our original brief, p. xxix).

Appellee further argues that this section may be unconstitutional because contrary to the 14th Amendment. Certainly a remedy dependent upon having the State Court declare a state statute denying the remedy unconstitutional is not a "plain" remedy within the meaning of the *Johnson Act*.

In this connection the amici curiae in their brief (p. 46) flatly insist that the State of Georgia has denied to Appellant the right to sue for an injunction in the State Court. If counsel for the Appellee and for the amici curiae cannot agree on whether such remedy exists, it certainly cannot be said to be "plain".

Finally, Appellant has already tried and been denied an injunction in the State Court, *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139.

#### *Contract Valid.*

Appellee argues (his brief p. 40-47) that a State may not constitutionally enter into a contract of tax exemption and that such contract is contrary to the 14th Amendment. Both this Court and the Supreme Court of Georgia have repeatedly decided against this contention. To sustain Appellee in this regard would require the reversal of scores of decisions of this Court. We do not assume that this Court, on summary argument, desires reargument of questions settled by repeated decisions of this Court.

#### *Failure to Build All Lines Authorized.*

The only case cited by either Appellee or counsel amici curiae which may appear to hold that a railroad may forfeit its contractual tax exemption by failure to complete all its lines is *State v. Morgan*, 28 La. 490, cited on p. 30 of the brief amici curiae. In that case the exemption was for a limited period of

ten years after the completion of the railroad within the state. The railroad was never completed. Yet it claimed exemption many years after the expiration of ten years from the time when it should have been completed. In other words, the railroad was attempting to convert a limited exemption of ten years into an indefinite and unlimited exemption by the simple expedient of never completing the railroad. Moreover, the case was actually decided on the ground that the railroad had been sold at foreclosure and the exemption did not carry through to the purchaser, and the case was affirmed by this Court on that ground only, *Morgan v. Louisiana*, 93 U. S. 217.

In *Bacon v. Texas*, 163 U. S. 207, cited both by Appellee (his brief p. 49) and by amici curiae (his brief p. 29) as being strikingly similar, there was failure to comply with express conditions precedent to a grant of land. As pointed out in our original brief (p. 36), there certainly was no express condition in this case that the railroad must complete all of the railroad that it had authority to build. On the contrary, as pointed out in our original brief, it is clearly evident that the legislature contemplated that Appellant would not build all of the railroad it might have been authorized to build and the legislature acquiesced in the failure to build the Eatonton branch and finally withdrew the right to build the Eatonton branch.

Moreover, this Court in the *Bacon* case actually decided only that the State Court had decided no Federal question and dismissed the writ of error.

Respectfully submitted,

ROBERT B. TROUTMAN

FURMAN SMITH

*Counsel for Appellant.*

Spalding, Sibley, Troutman & Kelley  
434 Trust Company of Georgia Building  
Atlanta, Georgia

*Of Counsel for Appellant.*